FILED BY CLERK
OCT 11 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT J. COLVIN and VERNA RAE COLVIN, husband and wife; JAY D. COLVIN and BRENDA KAY COLVIN, husband and wife; and COLVIN FARMS, an Arizona general partnership, Plaintiffs/Appellants/ Cross-Appellees, v. GRAHAM COUNTY, a political subdivision of the State of Arizona, Defendant/Appellee/ Cross-Appellant.	2 CA-CV 2010-0167 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CV2006036

Honorable R. Douglas Holt, Judge

AFFIRMED IN PART
REVERSED AND REMANDED IN PART

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K E L L Y, Judge.

¶1 Appellants, Robert J. and Verna Rae Colvin, Jay D. and Brenda Kay Colvin, and Colvin Farms (collectively "Colvins"), appeal the trial court's April 30, 2010, judgment against them and in favor of Graham County after the court granted the County's motion for summary judgment. The County cross-appeals the court's denial of sanctions it sought under Rule 68, Ariz. R. Civ. P. The Colvins contend the court erred in finding their negligence and inverse condemnation claims against the County precluded because their notice of claim did not satisfy the requirements of A.R.S. § 12-821.01. Because we conclude the notice was insufficient with respect to the Colvins' inverse condemnation claim and reject their argument that application of the statute violated their rights under the Arizona and United States Constitutions, we affirm the court's judgment precluding the inverse condemnation claim. But because there is a genuine issue of material fact as to when the Colvins' negligence claim against the County accrued, we reverse the court's judgment on that claim and their request for injunction. We do not address the County's cross-appeal because our reversal of summary judgment on the Colvins' negligence claim renders the cross-appeal moot.

Background

¶2 On appeal from the grant of a motion for **s**ummary judgment "[w]e view the evidence and reasonable inferences in the light most favorable to the non-moving party." *Aranki v. RKP Invs., Inc.*, 194 Ariz. 206, ¶ 6, 979 P.2d 534, 536 (App. 1999). The Colvin family has owned and farmed land in Graham County since the late 1800s. In 2005, the Colvins owned or leased approximately 1,086 acres[1] of farmland in the county. The Gila River runs along the western and southern edges of the Colvins' property, crossing its southwest corner. Eden Road[2] bisects the Colvins' property. In 1984, Graham County constructed a bridge over the Gila River at Eden Road, adjacent to the Colvins' property. According to the parties' joint-pretrial statement, the bridge "replac[ed] an older, smaller bridge."

¶3 The Gila River flooded in February 2005. The trial court found that on February 14, "flood waters backed up from the bridge in the Gila River channel and overtopped the Colvin dike." As a result, "a large amount of sediment" was deposited on the Colvins' property and portions of it remained underwater for several months. The Colvins maintain the County was negligent because it failed to clear debris from the

[1]The parties disagree on the number of acres of land the Colvins owned in 2005. The County insists the Colvins owned "approximately 950 acres of land," and that 107.57 acres of the amount they claim they owned were "owned by Colvin Arizona Properties, LLC . . . [which] is not listed as a party in this lawsuit." In its ruling on the county's motion for summary judgment, the trial court stated the Colvins "farmed approximately 950 acres."

[2]At various points in the record this road is referred to as "Bryce-Eden Road" and "Cork Eden Road." We refer to it as "Eden Road."

riverbed near the bridge, and the debris caused the water to back up and damage their property.

¶4 On February 22, 2005, the Colvins filed multiple "notice of loss" forms with the Farm Services Agency (FSA) under the Non-Insured Crop Disaster Assistance Program (NAP). The forms, signed by Jay Colvin, listed "flood" in response to the question "what disaster event(s) caused loss" and stated the disaster began on February 12, 2005. On all but one of the forms he described the disaster as "on going." On two of the forms, he left blank the section asking "[w]hen was loss apparent."

¶5 More than seven months later, on October 7, 2005, the Colvins filed a notice of claim with the County in which they asserted they had suffered damage to their sod and cotton crops, as well as their dikes, ditches and sprinklers. The Colvins alleged that "because the County failed to keep the area around and under the Bridge clear, the water backed up and ultimately overtopped a levy on [the] east bank of the river." In the notice, the Colvins claimed that after construction was completed on the Eden Road bridge, "the County . . . allowed the area surrounding and under the Bridge to become overgrown with brush that significantly block[ed] the flow of water under the Bridge." The Colvins further asserted they personally cleared the riverbed until 1993 or 1994, when the County ordered them to stop.

¶6 The notice stated that although the Colvins "[had] hope[d] that a substantial portion of the crops that had been inundated could be recovered," they "could not fully evaluate the property's condition until late April and early May 2005" because farm equipment could not be moved onto the property due to ground conditions. The Colvins

stated they could not have investigated or "discovered" the damage until after they were able to move the equipment onto their property.

¶7 On February 6, 2006, the Colvins filed a complaint in the Superior Court of Graham County alleging claims for a taking of property in violation of 42 U.S.C. § 1983, inverse condemnation under article II, § 17 of the Arizona Constitution, negligence, and injunctive relief. The County filed a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., alleging the Colvins' claims were time-barred by A.R.S. § 12-821.01, the notice of claim statute. The trial court denied this motion finding that "issues of fact exist[ed] as to whether the plaintiffs' state claims are time-barred by A.R.S. § 12-821.01." A trial date eventually was set for September 2009.

¶8 On June 1, 2009, the County filed several motions for summary judgment. In one motion it requested "summary judgment against [the Colvins'] claims for inverse condemnation, negligence and injunctive relief" on the grounds that the Colvins' notice "was untimely filed and . . . insufficient because it does not contain any reference to [the Colvins'] claim for inverse [condemnation]." Following a hearing, the trial court granted summary judgment in favor of the County, finding the Colvins' "cause of action [was] barred by the statute of limitations." The court also ruled the Colvins' claim for inverse condemnation was barred because it was not mentioned in the notice.

¶9 The Colvins filed a motion for new trial pursuant to Rule 59, Ariz. R. Civ. P., and requested a ruling on "outstanding issues." The trial court denied the motion and entered judgment in favor of the County on April 30, 2010. The court awarded the County the costs it had incurred before serving the Colvins with an offer of judgment but

declined to impose additional fees or costs as a sanction pursuant to Rule 68, Ariz. R. Civ. P. The County filed a motion for new trial on the court's denial of Rule 68 sanctions, which the court denied. The Colvins' appeal, and the County's cross-appeal from the court's denial of sanctions followed.

Discussion

The Colvins' appeal

¶10 The Colvins contend the trial court erred in granting summary judgment in favor of the County on their claims for inverse condemnation, negligence and injunctive relief on the ground their October 2005 notice of claim did not satisfy the requirements of § 12-821.01(A) or (B). "We review de novo the trial court's application of the law and its determination whether genuine issues of material fact preclude summary judgment." *State Comp. Fund v. Yellow Cab Co. of Phx.*, 197 Ariz. 120, ¶ 5, 3 P.3d 1040, 1042 (App. 1999). Similarly, we review de novo a trial court's determination that a party's notice of claim failed to comply with the requirements of the statute. *See Jones v. Cochise Cnty.*, 218 Ariz. 372, ¶ 7, 187 P.3d 97, 100 (App. 2008). We consider only "evidence that was in the record before the trial court during its summary judgment deliberations." *Menendez v. Paddock Pool Constr. Co.*, 172 Ariz. 258, 261, 836 P.2d 968, 971 (App. 1991). Summary judgment is proper when "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13, 122 P.3d 6, 11 (App. 2005), *quoting* Ariz. R. Civ. P. 56(c).

Notice of Claim

¶11 One of the grounds upon which the County sought summary judgment was that the Colvins' "Notice . . . did not satisfy the requirements of [A.R.S.] § 12-821.01(A) . . . because it was untimely filed." Under § 12-821.01(B), a claim "accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause." In determining when a claim accrues "'[t]he relevant inquiry is when did a plaintiff's knowledge, understanding, and acceptance in the aggregate provide[] sufficient facts to constitute a cause of action.'" *Thompson v. Pima Cnty.*, 226 Ariz. 42, ¶ 12, 243 P.3d 1024, 1028 (App. 2010), *quoting Little v. State*, 225 Ariz. 466, ¶ 9, 240 P.3d 861, 864 (App. 2010). "'A [claimant] need not know *all* the facts underlying a cause of action to trigger accrual.'" *Id.*, *quoting Doe v. Roe*, 191 Ariz. 313, ¶ 32, 955 P.2d 951, 961 (1998) (emphasis in *Thompson*). But, the claimant "'must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury.'" *Id.*, *quoting Doe*, 191 Ariz. 313, ¶ 32, 955 P.3d at 961.

¶12 The County argued "undisputed evidence . . . show[ed] that [the Colvins] knew several months before April 9, 2005, both that they had been damaged, and the alleged cause of that damage." In support of this assertion, the County pointed to the February 2005 "notice of loss" forms the Colvins filed with the FSA. The County also pointed to deposition testimony of Jay Colvin and the County's land appraisal expert, including the expert's statement that "a reasonable person would have known that they had been damaged and lost crops when they saw the water standing on the fields."

¶13 In opposing the County's motions for summary judgment, the Colvins contested the meaning and effect of this evidence, and argued the County had taken it out of context. *See* § 12-821.01; *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 15, 180 P.3d 977, 980 (App. 2008). The Colvins maintained they could not have known their property had been damaged until after the flood waters had receded and they attempted to salvage their crops. The trial court rejected this argument, concluding the Colvins knew they had been damaged on February 14 when their dike was overtopped. And, relying on the FSA forms filed on February 22, the trial court also found that because the forms "state[d] that the flood damage [had] occurred on February 12, 2005," the Colvins knew they had been damaged by February 22, "[a]t the very latest."

¶14 The Colvins argue the County did not "produce sufficient evidence to show no genuine dispute of material fact exist[ed]" regarding the date they realized they had been damaged. A party moving for summary judgment has the burden to establish "the non-moving party does not have enough evidence to carry its ultimate burden of proof at trial.'" *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 10, 212 P.3d 853, 856 (App. 2009), *quoting Nat'l Bank*, 218 Ariz. 112, ¶ 26, 180 P.3d at 984. A moving party satisfies its burden of production by producing "evidence it believes demonstrates the absence of a genuine issue of material fact and [by] explain[ing] why summary judgment should be entered in its favor." *Nat'l Bank*, 218 Ariz. 112, ¶ 14, 180 P.3d at 980.

¶15 The Colvins maintain that even if the County met its initial burden of production, they presented sufficient conflicting evidence to, at a minimum, "put the

issue in dispute," precluding summary judgment. They contend the trial court was "factually incorrect" in finding "[t]here can be no doubt, and no genuine issue of fact, that the Plaintiffs Colvins knew . . . when the flood occurred that they had been damaged, and that they knew the cause of their damages, Graham County negligence." The Colvins also contend their claims did not accrue until May 2005, when they "realized the County had damaged Colvin Farm."

¶16 We first address the time at which the Colvins knew they had been damaged by the flood. The Colvins concede that some of the FSA forms state "their loss was 'apparent' on February 12, 2005." And, while they are correct that two of the FSA forms show no date upon which loss was apparent, the fact that the forms were filed on February 22 indicates they knew at least by then that they had been damaged by the flood. The forms state specifically that the Colvins were either prevented from planting upland cotton or that they anticipated low yield on other crops. The fact that they did not know until May 2005 that their late-planted cotton crop failed, or until August 2005 that their sod and alfalfa crops failed, does not negate their knowledge they had been damaged soon after they saw their fields under water. The trial court thus concluded correctly that the FSA forms established that the Colvins realized they had been damaged by at least February 22 when they informed the FSA that the flood had prevented them from planting crops.

¶17 We next address when the Colvins knew, or reasonably should have known, the cause of their damages. The Colvins argue summary judgment was improper even if they knew they had been damaged in February 2005, because there was a genuine

issue of material fact whether they had reason to know that the damage resulted from the County's negligence. We agree. In granting the County's motion for summary judgment, the trial court stated, "[l]ogically, by voluntarily clearing the vegetation and complaining when the County did not do the work of vegetation clearing, [the Colvins] must have recognized as early as 1994 or 1995 that the County's alleged negligent riverbed maintenance had the potential to cause them damage." Therefore, the court reasoned, when the Colvins' land flooded in 2005, they "immediately knew or reasonably should have known the source of their damages."

¶18 The trial court rejected the Colvins' assertion that, given the perceived magnitude of the flooding, they were reasonable in attributing the cause to a natural disaster and not to liability on the part of the County. The court instead adopted the County's counter assertion that because the Colvins had claimed since the early 1990s that the County had failed to meet its obligation to keep the bridge clear of vegetation, they should have recognized such failure as the potential cause of the flooding. But the court's determination necessarily involved a credibility determination and weighing of the evidence, both of which are inappropriate assessments for a court to make when considering a motion for summary judgment. In *Braillard v. Maricopa County*, 224 Ariz. 481, ¶ 19, 232 P.3d 1263, 1271 (App. 2010), this court stated "we will reverse an order granting summary judgment which necessarily required the trial court to assess 'the credibility of witnesses with differing versions of material facts, . . . to weigh the quality of documentary or other evidence, . . . [or] to choose among competing or conflicting inferences.'" *Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990).

"Summary judgment should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Id*. at 309, 802 P.2d at 1008.

¶19 A cause of action accrues only "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." § 12-821.01(B). The Colvins argue they did not initially know or have reason to know their damage was caused by the County's negligence, contending they did not know they had a possible cause of action against the County until they discovered the water flow in the Gila River was well under the bridge's design capacity. That is, if the water flow had exceeded the bridge's capacity, the flood would have occurred even if the County had properly maintained the river bed by clearing the vegetation, and the Colvins would have had no cause of action against the County.

¶20 The record before the trial court on summary judgment does not provide any basis from which we can determine when the Colvins knew or should have known that the water flow in the Gila River channel did not exceed the Eden Road bridge's capacity. The County argues the Colvins have failed to "identif[y] any connection between [their] perception of the flow rates that existed during the flood and [their] inability to consider that the County's failure to clear debris . . . might be a cause of [their] damages." But to withstand summary judgment the non-moving party need only

"present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact." *Nat'l Bank*, 218 Ariz. 112, ¶ 26, 180 P.3d at 984.

¶21 The County provided no evidence other than the Colvins' prior clearing activity approximately ten years earlier to establish the Colvins had "reasonable notice to investigate whether the injury [wa]s attributable to [the County's] negligence." *Walk v. Ring*, 202 Ariz. 310, ¶ 25, 44 P.3d 990, 996 (2002). And despite the County's argument both below and on appeal that the Colvins knew or should have known the debris under the bridge was the cause of their damages, the County asserted at oral argument that its evidence showed there was no debris under the bridge after the flood. Specifically, the County referred to inspection photographs taken by the Department of Water Resources, and submitted to the trial court, that showed the area under the bridge was free of debris.

¶22 The County's evidence that there was no debris under the bridge not only contradicted its own argument that the Colvins knew the County's failure to clear debris was the cause of their damage, but it created a material issue of fact as to whether any debris existed in 2005 to put the Colvins on notice of a debris problem. In addition, no evidence contradicted the Colvins' assertion that until the flow rate was known they could not have known whether their damages had been caused by the County's negligence or were simply the result of a natural disaster. And there was no evidence as to when they actually knew or had reason to know the flow rate. The County conceded at oral argument that it had not asked Jay Colvin in his deposition about the time at which he had learned the flow rate for the February 12 flood. We therefore agree with the

Colvins that there were disputed issues of material fact regarding when their claims accrued and whether their action is barred by § 12-821.01.

¶23 Our dissenting colleague concludes the Colvins' contention about the magnitude of the flood is undercut by the existence of website data about the Gila River's flow rates. But the only evidence in the record before the trial court concerning the Colvins' knowledge of the flow rate is a July 20, 2005, letter written by Jay Colvin stating the flow rate was 60,000 cubic feet per second (cfs). At most, this shows that the Colvins knew by July 20 that the flow rate was less than the initial reports of 70,000 to 80,000 cfs but more than the actual rate of 39,358 cfs. And it does not establish that the Colvins knew or reasonably should have known the flood had not exceeded the bridge's design capacity at an earlier date.

¶24 Unlike our dissenting colleague, we do not consider the flow data evidence because we have found nothing in the record to suggest that any evidence about gauges or websites containing flow data was presented to the trial court, and we are bound to consider only "evidence that was in the record before the trial court during its summary judgment deliberations." *Menendez*, 172 Ariz. at 261, 836 P.2d at 971. And while we may affirm a trial court "where any reasonable view of the facts and law might support [its] judgment," *City of Phx. v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985), we do not believe this principle should be applied when facts not presented to the trial court are raised for the first time in appellate briefs.

Injunction

¶25 The Colvins additionally contend the trial court erred in barring their claim for injunctive relief because the notice of claim statute does not apply to actions in which injunctive relief is sought. § 12-821.01(A); *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, ¶ 31, 199 P.3d 629, 636 (App. 2008) (notice of claim statute applies to request for damages, rather than request for declaratory or injunctive relief). The County contends actions that mandate government action, rather than restrain it, are subject to § 12-821.01 because an injunction that requires the County to act impacts the County's budget.[3] We review questions of statutory interpretation de novo. *Hobson v. Mid-Century Ins. Co.*, 199 Ariz. 525, ¶ 6, 19 P.3d 1241, 1244 (App. 2001).

¶26 In its minute entry denying the Colvins' motion for new trial, the trial court did not indicate it had dismissed the Colvins' request for injunctive relief based on § 12-821.01. Rather, the court stated, because "the negligence claim has been dismissed . . . injunctive relief would not be available to the [Colvins]." We therefore need not address the propriety of the court's analysis of this issue because we have already determined the court erred in dismissing the Colvins' negligence action. Nor do we address the applicability of § 12-821.01 to the Colvins' claim for injunctive relief; that issue is moot. *See Arpaio v. Maricopa Cnty. Bd. of Supervisors*, 225 Ariz. 358, ¶ 7, 238 P.3d 626, 629 (App. 2010) ("Recognizing and declining to rule on moot issues is a 'discretionary policy

[3]The suggestion that injunctions prohibiting government action do not have budgetary implications is incorrect. *See, e.g., Home Builders Ass'n of Cent. Ariz. v. City of Apache Junction*, 198 Ariz. 493, ¶ 32, 11 P.3d 1032, 1042 (App. 2000) (reversing trial court ruling that permitted city to impose development fees to finance capital costs for additional schools).

of judicial restraint.'"), *quoting Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 119, 912 P.2d 1345, 1348 (App. 1995).

Inverse condemnation

¶27 The Colvins also argue the trial court erred in "grant[ing] summary judgment against [their] claims for inverse condemnation" on the basis that their "Notice . . . d[id] not contain any allegation or 'claim' that the Colvin Farms suffered diminution in value due to the breach of the dike by the flood waters." The Colvins contend their notice "fulfilled the requirements of A.R.S. § 12-821.01(A)" and they were "not required to confine their claimed damages at trial to the amount stated in the Notice." We review de novo whether "a party's notice of claim failed to comply with [the notice requirements of] § 12-821.01." *Jones*, 218 Ariz. 372, ¶ 7, 187 P.3d at 100.

¶28 We interpret statutes with the primary goal of giving effect to legislative intent. *Hobson*, 199 Ariz. 525, ¶ 8, 19 P.3d at 1245. "We first look to the plain language of the statute as the best indicator of legislative intent." *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 28, 218 P.3d 1069, 1080 (App. 2009). Section 12-821.01(A) requires that a notice of claim contain two separate sets of facts: 1) those "sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed," and 2) those facts supporting the specific amount for which the claimant will settle. § 12-821.01(A); *Backus v. State*, 220 Ariz. 101, ¶ 17, 203 P.3d 499, 503 (2009) ("claimant must explain not only the facts forming the basis of alleged liability, but also the specific amount requested and the facts supporting that amount").

¶29 The Colvins' notice did not provide facts "sufficient to permit" the County to understand the Colvins might have an inverse condemnation claim. Such a claim arises under article II, § 17 of the Arizona Constitution, which provides that a government entity must pay the owner just compensation when it "takes or damages private property." *See A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, ¶ 18, 217 P.3d 1220, 1230 (App. 2009). In order to establish a claim for inverse condemnation, the plaintiff must establish the "governmental entity constructed or developed a public improvement that substantially interfered with the plaintiff's property right." *Id.*

¶30 The notice stated "the County has allowed the area surrounding and under the Bridge to become overgrown with brush that significantly blocks the flow of water under the Bridge" and "the Bridge should have easily accommodated [the water] flow." But, as to the damages caused by the flooding, the notice described only the losses to the Colvins' sod and cotton crops and the damages to dikes, ditches, and sprinklers. The notice did not provide any facts that would put the County on notice that it had "constructed or developed a public improvement that substantially interfered with the plaintiff's property right." *Id.* The Colvins' claim is based on the County's alleged negligence in failing to maintain the area under and around the Eden Road bridge, not the construction or development of the bridge itself some twenty years earlier.[4] Nothing in

[4]The Colvins never suggested the bridge was improperly constructed. In fact, the Colvins repeatedly argued the bridge as constructed should have been able to accommodate the river's flow.

the notice suggests the Colvins were claiming the value of their land was diminished due to the construction of the bridge.

¶31 Section 12-821.01 is intended to "'allow the public entity to investigate and assess liability, . . . permit the possibility of settlement prior to litigation, and . . . assist the public entity in financial planning and budgeting.'" *Vasquez v. State*, 220 Ariz. 304, ¶ 9, 206 P.3d 753, 757 (App. 2008), *quoting Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 6, 152 P.3d 490, 492 (2007). It "ensure[s] that government entities will be able to realistically consider [the] claim." *Deer Valley*, 214 Ariz. 293, ¶ 9, 152 P.3d at 493. The Colvins rely on language from *Backus* and *Deer Valley* to support their contention that in order to comply with § 12-821.01(A), a claimant need only provide a "factual foundation that the claimant regards as adequate." But because both cases deal with the second prong of the statute, which addresses the "specific amount" claimed, they are not helpful in assessing the sufficiency of the notice and the facts alleged therein for an inverse condemnation claim. *Backus*, 220 Ariz. 101, ¶¶ 17-23, 203 P.3d at 503-05; *Deer Valley*, 214 Ariz. 293, ¶¶ 9-11, 152 P.3d at 493-94.

¶32 The "facts sufficient" requirement is distinct from the requirement that the claimant provide "facts supporting" the amount claimed. § 12-821.01; *Backus*, 220 Ariz. 101, ¶ 22, 203 P.3d at 504; *Havasupai Tribe v. Ariz. Bd. of Regents*, 220 Ariz. 214, ¶ 40, 204 P.3d 1063, 1074-75 (App. 2008). Whether the word "claim" in § 12-821.01(A) requires a claimant to specify the particular legal theories it will pursue at trial "or simply references the claimant's broader claim for relief" has not been specifically ruled on by an appellate court in our state. *See Mutschler v. City of Phx.*, 212 Ariz. 160, n.4, 129

P.3d 71, 73 n.4 (App. 2006). We need not address this issue, however, because the notice does not "contain facts sufficient to permit the public entity . . . to understand" the Colvins might have a claim for liability on an inverse condemnation theory. § 12-821.01(A). We therefore affirm the trial court's ruling that the Colvins' notice was insufficient for their inverse condemnation claim.

Constitutionality of § 12-821.01

¶33 The Colvins next argue applying § 12-821.01 to claims for inverse condemnation is improper and violates both the United States and Arizona Constitutions.[5] Although the trial court did not specifically address this argument below, in granting the County's motion for summary judgment the court implicitly rejected it. *See Lowe v. Pima Cnty.*, 217 Ariz. 642, n.3, 177 P.3d 1214, 1217 n.3 (App. 2008) (by ruling "[j]udgment constitutes a final judgment in this case" court implicitly resolved unaddressed claims). We review the constitutionality of statutes de novo. *City of Tucson v. Pima Cnty.*, 199 Ariz. 509, ¶ 18, 19 P.3d 650, 656 (App. 2001). Because we presume statutes are constitutional, the party seeking to invalidate a statute must establish that it is unconstitutional beyond a reasonable doubt. *See Samaritan Health Sys. v. Superior Ct.*, 194 Ariz. 284, ¶ 21, 981 P.2d 584, 590 (App. 1998). Relying on *Felder v. Casey*, 487 U.S. 131 (1988), the Colvins contend "[t]he notice of claim statute cannot apply to claims

[5]The County argues the Colvins did not raise this issue in the trial court and therefore have waived it. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768-69 (App. 2000) ("we generally do not consider issues, even constitutional issues, raised for the first time on appeal"). However, because the Colvins did raise the issue in their opposition to the County's motion for summary judgment, it is not waived. *Cf. Hahn v. Pima Cnty.*, 200 Ariz. 167, ¶ 13, 24 P.3d 614, 619 (App. 2001) (failure to raise issue in trial court constitutes waiver).

rooted in the United States Constitution or the Arizona Constitution, and, therefore, § 12-821.01 does not bar [their] claim for inverse [condemnation]." They argue the "procedural burdens" of § 12-821.01 violate their due process rights and are "fundamentally at odds with bedrock constitutional principles." We disagree.

¶34 Preliminarily, the trial court's ruling on the Colvins' federal cause of action, a claim under 42 U.S.C. § 1983 for "Taking of Property," which they had set forth in their initial complaint, was not based on the application of Arizona's notice of claim statute. As the County points out, the court ruled in 2007 that the Colvins' "federal claim [was] not ripe." The court concluded "a property owner cannot bring a Federal taking claim under the Fifth Amendment of the United States Constitution until he or she has followed the State procedure for recovery and has been denied compensation."[6] Having decided the Colvins' § 1983 claim was not ripe, the court would not have addressed that claim in its ruling that § 12-821.01 barred the Colvins' negligence and inverse condemnation claims. We therefore do not address the issue.[7]

¶35 The Colvins additionally argue the Arizona Constitution exempts their state law inverse condemnation claim from compliance with § 12-821.01. They contend no Arizona court has determined the implications of the Arizona Constitution on § 12-

[6]The Colvins did not challenge this decision.

[7]In their reply brief the Colvins contend "the Superior Court's dismissal of Colvin's [sic] state-law claims made [their] § 1983 claims ripe." Assuming they are correct, our partial reversal of the superior court's judgment renders the issue moot. Further, because the trial court's July 2009 ruling does not address the Colvins' § 1983 claim, we do not agree with the Colvins that "[t]he Superior Court incorrectly applied federal and state procedural law to [it]." Once ripe, nothing in the ruling prevents the Colvins from reasserting their § 1983 claims.

821.01 and the statute's predecessor did not apply to inverse condemnation actions. The Colvins also argue we should join the courts of other states and hold that "no state notice-of-claim statute may impair a claimant's right to bring an inverse [condemnation] action."

¶36 In *Flood Control District of Maricopa County v. Gaines*, this court concluded § 12-821 was constitutional as applied to claims for inverse condemnation. 202 Ariz. 248, ¶¶ 17-18, 43 P.3d 196, 202 (App. 2002). The court addressed the constitutionality of the one-year limitations period under § 12-821, but did not specifically address the constitutionality of § 12-821.01's notice of claim requirement. *Gaines*, 202 Ariz. 248, ¶ 6, 43 P.3d at 199. But, in *Gaines* we recognized that our jurisprudence does not "preclud[e] the legislature from establishing the period within which constitutionally-based causes of action must be brought." *Id.* ¶ 10. A legislative restriction on bringing constitutionally based claims is impermissible only when it "effectively deprive[s] the claimant of the ability to bring the action." *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 106, 692 P.2d 280, 285 (1984). In *Gaines*, we determined the one-year statute of limitations could constitutionally be applied to inverse condemnation claims because it "does not bar an action for inverse condemnation until one year after it accrues, and because a cause of action under § 12-821 does not accrue until it is 'discovered.'" 202 Ariz. 248, ¶ 17, 43 P.3d at 202. Therefore, the statute did not impede the claimant's "ability to bring the action." *Id.*; *see also Barrio*, 143 Ariz. at 106, 692 P.2d at 285. Likewise, § 12-821.01 does not deprive the Colvins of their claim for inverse condemnation because, as

claimants, they were not charged with filing their notices of claim until their claims accrued. *Long v. City of Glendale*, 208 Ariz. 319, ¶ 11, 93 P.3d 519, 525 (App. 2004) ("the restrictive time periods for bringing claims against public entities are not unreasonable precisely because such claims do not accrue until the claimant realizes he or she has been injured").[8] Although the Colvins are correct that *Gaines* does not address subsection § 12-821.01, we consider its rationale to be applicable to § 12-821.01 and we are unpersuaded that we should reject it in favor of the out-of-state authority cited by the Colvins. *Cf. Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶ 149, 98 P.3d 572, 614-15 (App. 2004) ("we turn to out-of-state authority for guidance" in absence of Arizona authority on point).[9] We conclude the Colvins have not demonstrated beyond a reasonable doubt that § 12-821.01 violates the Arizona Constitution.

County's cross-appeal

¶37 On cross-appeal, the County argues the trial court erred by denying its "request for sanctions against [the] Colvin[s] pursuant to [Rule] 68(g)[, Ariz. R. Civ. P.]" In April 2009, the County served the Colvins with an offer of judgment whereby the Colvins' claims would be dismissed with prejudice and the Colvins would receive $5,000

[8]To the extent the Colvins argue their cause of action for inverse condemnation did not accrue at the same time as their other damages, under *Haab v. Cnty. of Maricopa*, 219 Ariz. 9, ¶ 24, 191 P.3d 1025, 1029-30 (App. 2008), they could have filed an amendment or a new notice of claim. They did not do so.

[9]All the cases cited by the Colvins were decided before *Gaines* was decided. *See Alexander v. State*, 381 P.2d 780 (Mont. 1963); *Alper v. Clark Cnty.*, 571 P.2d 810 (Nev. 1977); *Hollenbeck v. City of Seattle*, 153 P. 18 (Wash. 1915).

"for all damages, taxable court costs and attorney's fees." The Colvins rejected the offer. Rule 68(g) provides:

> If the offeree rejects an offer and does not later obtain a more favorable judgment other than pursuant to this Rule, the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer and prejudgment interest on unliquidated claims to accrue from the date of the offer.

Because we reverse the court's ruling barring the Colvins' negligence claims and granting judgment in favor of the County, this issue is moot and we need not address it. *See Arpaio*, 225 Ariz. 358, ¶ 7, 238 P.3d at 629.

Disposition

¶38 We affirm the trial court's judgment precluding the Colvins' inverse condemnation claim, reverse its grant of summary judgment in favor of the County on the Colvins' claims for negligence and injunctive relief, and remand the case for further proceedings.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

E S P I N O S A, Judge, dissenting in part.

¶39 I concur with the majority in most respects, but respectfully disagree with its conclusion that there is a genuine issue of material fact as to when the Colvins knew or reasonably should have known the County's negligence was a cause of their damages for purposes of filing their notice of claim. The majority concludes, and I agree, that the Colvins knew in February 2005 that they had been damaged, at least by the time they filed their notices of loss with the FSA. But I would find the Colvins also knew at that time, or at the least should have known, that these damages might be attributable to the County.

¶40 As *Thompson* makes clear, the Colvins "'did not have to know all of the underlying details of [how their damages occurred] before their cause of action accrued.'" 226 Ariz. 42, ¶ 14, 243 P.3d at 1029, *quoting Alaface v. Nat'l Inv. Co.*, 181 Ariz. 586, 591, 892 P.2d 1375, 1380 (App. 1994). Rather, they merely needed a reason to connect their damages to a particular actor "'in such a way that a reasonable person would be on notice to investigate whether the injury might [have] result[ed] from fault.'" *Id.* ¶ 11, *quoting Walk*, 202 Ariz. 310, ¶ 22, 44 P.3d at 996. At the time of the flood, the Colvins were aware that the County had not been clearing the vegetation under the Eden Road bridge because they had cleared the debris themselves until 1993 when a County officer allegedly told them to stop.[10] Then, in 1994 or 1995, Jay Colvin complained at a

[10]At oral argument, the County asserted that it did not order the Colvins to stop but rather informed them they needed a permit under federal law. This disputed fact is

public meeting that "debris on the bridge [wa]s plugging up the . . . waterway and backing the water up," and a County Supervisor assured him "the County would take care of it." Thus, the Colvins knew before the flood that debris around the bridge could cause the river to overflow, and they believed that clearing this debris was the County's responsibility. Significantly, this is the precise theory they advanced as the cause of their damages in their October 2005 notice of claim, as well as the sole basis for their negligence claim when they ultimately sued the County. Although, as the majority correctly notes, inferences are construed in favor of the nonmoving party, there is only one logical inference to be drawn from these facts: the Colvins had "reasonable notice" in February 2005 "to investigate whether [their damages were] attributable to [the county's] negligence" in failing to clear the area around the bridge. *Thompson*, 226 Ariz. 42, ¶ 14, 243 P.3d at 1029, *quoting Walk*, 202 Ariz. 310, ¶ 25, 44 P.3d at 996 (second alteration in *Thompson*).

¶41 I find unpersuasive the Colvins' claim that they could not have known the County's alleged negligence, rather than a purely natural disaster, had caused their damages until after they had gained additional information about the magnitude of the flood and its relationship to "the design capacity of the Eden Bridge." This contention is undercut by the fact that the flow of the Gila River at the time of the flood was readily determinable, as was the capacity of the Eden Road bridge. *See Little*, 225 Ariz. 466, ¶ 13, 240 P.3d at 865 (rejecting argument that sufficient knowledge of negligence

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immaterial, however, because in either event, the Colvins recognized the buildup of debris around the bridge as a potential source of harm.

accrued only after plaintiff had received medical evidence of malpractice). Although the Colvins failed to provide any indication as to when they became aware of the volume of the flood, in its briefing the County pointed out the Gila River flow rates for the Colvins' area were and are publicly available year-round and updated hourly on the United States Geological Service's web site.[11] Accordingly, very shortly after the flood, the Colvins, particularly as highly experienced, and long-time area farmers, easily could have, and more importantly, reasonably should have known the magnitude of the flood, given the public availability of that information, not to mention impact on their farms and damage claims to the FSA. § 12-821.01(B) (cause of action accrues when damaged party realizes damages and knows *or reasonably should know* cause of damages). And, contrary to the majority's suggestion, that this information was not presented to the trial court does not indicate it was somehow unavailable to the Colvins. Thus, at the very least, the Colvins had constructive notice that "a wrong might have occurred." *Walk*, 202 Ariz. 310, ¶ 25, 44 P.3d at 996.

¶42 The majority also construes evidence submitted by the County that there was no debris under the bridge as inconsistent with its challenge to the timeliness of the Colvins' notice. But evidence of the validity, or lack thereof, of the Colvins' underlying

[11]*See National Water Information System*, United States Geological Survey, http://nwis.waterdata.usgs.gov/az/nwis/uv/?site_no=09466500&agency_cd=USGS. Although this web site is not in the record, courts may take judicial notice of the public records of state agencies. *See* Ariz. R. Evid. 201; *Jarvis v. State Land Dep't*, 104 Ariz. 527, 530, 456 P.2d 385, 388 (1969); *Adams v. Bolin*, 74 Ariz. 269, 271, 247 P.2d 617, 618 (1952); *Hernandez v. Frohmiller*, 68 Ariz. 242, 257, 258, 204 P.2d 854, 864, 865 (1949).

negligence claim has little bearing on the procedural question at hand. The determinative issue is what the Colvins alleged in their notice of claim after having been aware that build-up under the bridge could cause flooding and having long believed the County was shirking its duty to maintain the riverbed. They did not then, nor at any time since, contend they were unable to determine the condition of the riverbed. I would therefore find that the Colvins' claim accrued, for purposes of § 12-821.01(B), at the latest, by the time they filed their notices of loss with the FSA in February 2005.

¶43 Because I believe the notice of claim was untimely and summary judgment in favor of the County on this issue was appropriate, I would affirm the trial court's ruling dismissing the Colvins' negligence claims and go on to consider the remaining issues on appeal, including whether the trial court properly denied the County's request for sanctions under Rule 68, Ariz. R. Civ. P.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge